

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, For
the Use of KLB CONSTRUCTION, INC.,
a Washington corporation,

Plaintiff,

vs.

PERFORMANCE SYSTEMS, INC., an
Idaho corporation, TRAVELERS
CASUALTY AND SURETY COMPANY
OF AMERICA, a Connecticut corporation,

Defendants.

CASE NO.

COMPLAINT FOR RECOVERY ON
MILLER ACT PAYMENT BOND (40
U.S.C.A. §§ 3131-3134)

DEMAND FOR JURY TRIAL

COMMON ALLEGATIONS

1. Use-Plaintiff KLB Construction, Inc. ("Use-Plaintiff KLB" or "KLB"), is a Washington corporation, duly organized and existing under the laws of the State of Washington and doing business and having its principal place of business in King County, State of Washington.

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2. Defendant Performance Systems, Inc. ("PSI") is an Idaho Corporation, duly organized and existing under the laws of the State of Idaho. PSI has a registered agent in Washington State and conducts business in King County, Washington.

3. Defendant Travelers Casualty and Surety Company of America ("Travelers"), is a Connecticut corporation, duly organized and existing under the laws of the State of Connecticut with its principal place of business in Hartford, Connecticut and authorized to do business and is doing business in the State of Washington as a surety issuing bonds required by law or contract by the United States and various agencies within the jurisdiction.

4. This action arises and the court has jurisdiction, under the Miller Act, United States Code Annotated, Title 40, sections 3131 to 3134. 40 U.S.C.A. §§3131 to 3134. Venue is proper in this district because the Prime Contract described herein between defendant PSI and the United States of America acting by and through the US Army Corp. of Engineers, Seattle District, was to be performed and executed in the Western District of Washington. Use-Plaintiff PSI also invokes the pendent jurisdiction of this court as to any claims or causes of action which are not subject to the Miller Act, such claims presenting substantial issues before this court. Any and all claims found pendent are joined in this action as being derived from the common, operative facts of the Miller Act claims described below.

**CLAIM FOR RECOVERY ON
MILLER ACT PAYMENT BOND (40 U.S.C.A. §§ 3131-3134)
AGAINST ALL DEFENDANTS**

5. On or about September 29, 2011, Defendant PSI entered into a written contract (the "Prime Contract") with the United States of America, acting by and through the United States Army Corp. of Engineers, Seattle District (the "Corp. of Engineers"), to procure all work, furnish the materials and perform the labor for construction work in

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1 accordance with the Specifications entitled "Riverview Park Ecosystem Restoration,
2 Kent, Washington (the "Project") in accordance with the terms and conditions contained
3 in the Prime Contract, Contract No. W912DW-08-D-1022.

4 6 On or about September 29, 2011, pursuant to the terms of the Prime
5 Contract, Defendant PSI, as principal, and Defendants Travelers, as surety, executed and
6 delivered a payment bond in the amount of \$2,956,422.00 to the United States of
7 America, conditioned as required by the Miller Act, whereby said Defendants bound
8 themselves jointly and severally for the purpose of allowing a joint action or actions
9 against any or all of them. A true and correct copy of the Payment Bond is attached hereto
10 as Exhibit "A" and incorporated herein by reference.

11 7. On or about November 29, 2011, Use-Plaintiff KLB entered into a written
12 subcontract with Defendant PSI, under which KLB agreed to perform certain work and
13 provide certain labor, equipment and materials required for the Project under the Prime
14 Contract, to wit, mobilization and demobilization, temporary erosion control, channel
15 excavation including centerline staking, fill placement and site grading, reinforced soil
16 slope protection, in-channel habitat features - material and installation, and crushed
17 surface maintenance access road (the "Subcontract"). The agreed contract price to be paid
18 KLB for the work defined by the Subcontract was the sum of One Million and Seventy
19 Five Thousand Dollars (\$1,075,000.00). A copy of the Subcontract between Use-Plaintiff
20 KLB and Defendant PSI is attached hereto Exhibit "B" and incorporated herein by
21 reference.

22 8. Between December 1, 2011 and October 31, 2012, Use-Plaintiff KLB
23 furnished labor, equipment and materials on the Project pursuant to the Subcontract and at
24 the specific request of Defendant PSI in the execution of the work required in the Prime
25 Contract between Defendant PSI and the Corp. of Engineers.
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1 9. During the course of KLB's work on the Project, KLB was instructed by
2 PSI to provide additional and/or changed work to the Project, resulting in numerous
3 change orders, both additive and deductive, that increased the Subcontract total from
4 \$1,075,000.00 to \$1,374,536.56. Such changed work included, but is not limited to:
5 Additional quantity of channel excavation and center line staking than the quantity
6 estimated in the specifications; Additional quantity of fill placement and site grading than
7 the quantity estimated in the specifications; Build trailer yard and access road, Additional
8 excavation and field activity; Credit for abutment excavation; Emergency mobilization for
9 dozer work; Accelerated in Water Work Window; and Accepted PSI back charges.

10 10. Pursuant to the terms of the Subcontract, KLB timely submitted invoices to
11 PSI and has requested payment from PSI for all work performed it performed on the
12 Project. The sum of the payments received from PSI is \$938,470.07, with the last
13 payment received on October 5, 2012. The unpaid Subcontract balance totals
14 \$436,066.49, which is now due, owing and unpaid to KLB.

15 11. Defendant PSI has breached its Subcontract with KLB by failing to pay the
16 sum of \$436,066.49 in regular contract earnings earned by KLB for the performance of
17 the Subcontract work.

18 12. Use-Plaintiff KLB is entitled by law to recover interest on the amounts due
19 at the maximum legal pre-judgment interest rate from the date the sums became due and
20 owing to the date of judgment.

21 13. Use-Plaintiff KLB has employed the undersigned attorneys to enforce its
22 rights in this matter and is entitled to recover its attorneys' fees and costs from
23 defendants, as is provided for in the Subcontract.

24 14. Use-Plaintiff KLB has fully and completely performed all promises on its
25 part to be performed under the Subcontract with Defendant PSI, and under the bond,
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except those waived, prevented or excused by Defendants, and all of the conditions precedent to performance on the part of Defendants, and each of them, have occurred.

15. On or about January 30, 2013, KLB provided its Miller Act Notice of Claim to PSI and Travelers, which notes KLB's claim of \$436,066.49 for unpaid work provided to the Project

16. Use-Plaintiff KLB brings this action pursuant to the Miller Act, United States Code Annotated, Title 40 sections 3131 *et seq.*, to preserve its Miller Act rights. The Subcontract provided for mediation, at PSI election, prior to arbitration. Despite receiving KLB Miller Act Notice of Claim and otherwise being fully apprised and knowledgeable of the claim asserted by KLB, PSI has not exercised its right to require mediation. Contemporaneous with the filing of this Complaint, KLB has requested arbitration with PSI.

WHEREFORE, the United States of America, For the Use of Plaintiff KLB Construction, Inc., a Washington corporation, prays for Judgment against Defendants, and each of them, as follows:

1. For the Court to stay this action pending arbitration as required by the Subcontract;

2. For Judgment against Performance Systems, Inc., an Idaho corporation; and Travelers Casualty and Surety Company of America, a Connecticut corporation, in the sum of \$436,066.49 and such additional sums as are determined, according to proof;

3. For interest on said sum at the legal rate per annum from the date the sums became due through the date of Judgment;

4. For reasonable attorney's fees;

5. For costs of suit incurred herein; and

6. For such other and further relief as the court deems just and proper.

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1 DATED this 30th day of April, 2013.

2 /s/ Scott R. Weaver

3 John R. Welch, WSBA No. 26649

4 Scott R. Weaver, WSBA No. 29267

5 Attorneys for Plaintiff

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DEMAND FOR JURY TRIAL

Plaintiff United States of America, For the Use of KLB Construction, Inc., a Washington corporation, hereby demands trial by jury pursuant to *Fed.R.Civ.P. 38(b)*.

DATED this 30th day of April, 2013.

/s/ Scott R. Weaver

John R. Welch, WSBA No. 26649

Scott R. Weaver, WSBA No. 29267

Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system.

/s/ Scott R. Weaver

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